87-1099

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PATRICK HANNEKEN,
Petitioner,

vs.

DIXON DISTRIBUTING COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Section 301 of the Labor Management Relations Act is of special preemptive force so as to confer Federal Court original and removal jurisdiction in disputes involving employee discharges, where a collective bargaining agreement exists that contains "just cause" termination, grievance and binding arbitration award clauses.

2. Whether a state tort remedy for retaliatory discharge authorizing a jury award of punitive damages is specially preempted, where a collective bargaining agreement between the employee's collective bargaining agent and the employer, contains "just cause" termination, grievance and binding arbitration award clauses, because the state tort action necessarily is inextricably intertwined with consideration of the terms of the collective bargaining agreement.

3. Whether an employee who sustains a work related permanent partial disability for which he receives compensation, but which renders him physically unable to do his former job, and who is replaced by another union worker, may ignore the grievance and arbitration clauses of his collective bargaining agreement and maintain a state court suit for claimed discharge in retaliation for filing a Workers' Compensation claim.

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* This case was consolidated with *Willoughby v. Illinois Central Light Company,* No. 86-1973 (7th Cir.), for the purposes of oral argument. It was not, as Petitioner states in his Brief, consolidated for purposes of en banc argument.

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Respondent Dixon Distributing Company opposes the Petition for a grant of a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinions below are correctly cited and reported in the Petition and Appendix to the Petition for Writ of Certiorari.

JURISDICTION

The jurisdictional statement is correctly set out in the Petition for Writ of Certiorari.

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* Pursuant to Rule 28 of the Rules of the Supreme Court of the United States, Respondent, Dixon Distributing Company states that it has no parent, subsidiary or affiliate companies.

STATUTES INVOLVED

The statutes involved are correctly reflected in the Petition for Writ of Certiorari.

STATEMENT

The Statement of Facts and Proceedings Below contained in the Petition for Writ of Certiorari are in several significant places incomplete, obscured or misstated. Dixon Distributing Company (Dixon), therefore, submits an independent Statement of Facts and of Proceedings Below.

A. Facts.

The facts are established by Mr. Hanneken's admissions to the Employer-Respondent's Request for Admission of Facts and Genuineness of Documents, which were not the subject of a timely response or objection and, therefore, are deemed admitted, and by the pleadings in this case.

Dixon Distribution Company is a party to a collective bargaining agreement with the Teamsters, Chauffeurs, and Helpers Local Union No. 525, Alton, Illinois, which agreement covered the period relevant to the considered dispute. Patrick Hanneken is a member of the bargaining unit and worked as a driver-salesman for Dixon. Dixon is a distributor of Anheuser-Busch and related products. The agreement provides in pertinent part:

> "**Article 11. Discharge or Suspension.**
>
> The employer shall not discharge or suspend any employee without just cause, but in respect to discharge or suspension shall give at least one (1) warning notice of complaint against such employee to the employee in writing and with a copy of same to the union and job steward affected, except that no warning notice need be given to an employee, the union or job steward before he is discharged if the

cause of such discharge is dishonesty, or drunkenness or recklessness resulting in monetary damage. The warning notice shall not remain in effect for a period of more than one (1) year from date of said warning notice.

Discharge must be by proper written notice to the employee and union affected. *Any employee may request an investigation as to his discharge or suspension. Should such investigation prove that an injustice has been done an employee, he shall be reinstated. The local union and the employee shall have the authority to order full, partial or no compensation for time lost.* Appeal from discharge, suspension or warning notice must be taken within ten (10) days by written notice and decision reached within thirty (30) days from the date of discharge, suspension or warning notice."

• • •

"**Article 14. Grievance Machinery.**

The union and the employer agree that there shall be no strike, lock-out, tie-up, *or legal proceedings* without first using all possible means of a settlement, as provided for in this agreement, of any controversy which might arise. Grievances shall first be taken up between the employer and the local union involved, provided, however, that all grievances must be made known in writing by the other party within thirty (30) days, unless otherwise mutually agreed to, after their reason for such grievance has occurred, or after the first date upon which the grievant should have become aware of the existence of such grievance, whichever is later except that such thirty (30) day time limitation shall not apply in those instances in which the employer and an employee shall have agreed to a condition of employment contrary to that which is set forth in this agreement. A duly authorized representative of the employer or the union must make a written disposition of

> the matter within ten (10) calendar days after submission of such written grievance." [Emphasis supplied]

Upon failure of the employer and union to resolve the grievance, an appeal procedure is provided for appeal to a joint committee. A majority vote of the joint committee finally settles the grievance.

The collective bargaining agreement provides in Article 17 that:

> ". . . the employer agrees to cooperate toward the prompt settlement of employee on-the-job injury claims when such claims are due and owing."

The employer further agrees to carry workers' compensation insurance to pay job injury claims.

On February 23, 1984, Patrick Hanneken sustained an injury to his right arm while dropping beer barrels from a truck and while working for Dixon Distributing Company. He filed a claim for his injury with the Illinois Industrial Commission and later settled his claim for an amount that included an award for permanent partial disability.

On July 11, 1984, Mr. Hanneken, who had returned to work after the first injury, sustained another injury, this time to his low back and right shoulder while lifting pallets and while working for Dixon. He filed an application for adjustment of this injury claim with the Illinois Industrial Commission. Mr. Hanneken settled this claim for an amount that included an award for permanent partial disability.

On August 29, 1984, while Mr. Hanneken was off work as a result of the second injury and while he was receiving temporary total disability, he was examined by a Doctor Walters for his low back and right shoulder injuries. Doctor Walters was an evaluating physician, although the Petition for Certiorari refers to him as the "company doctor." Doctor Walter's report, based

on the subjective complaints of Mr. Hanneken of that date, states, inter alia,:

> "He is anxious to return to work with an indefinite restriction of not lifting over fifty pounds and I have given him a note to that effect."

On September 6, 1984, Mr. Hanneken informed Dixon he would never be able to lift over fifty pounds in weight for the rest of his life and asked for a "light duty" job. He was informed there was no "light duty" job available, and that all jobs required the lifting of barrels of beer, manipulating beer cases, or lifting other objects in excess of fifty pounds.

On September 19, 1984, Mr. Hanneken wrote Dixon asking for his accumulated sick pay and vacation pay. On September 20, 1984 a check for these items in the amount of $3,185.28 was forwarded to him. An employee does not receive accumulated vacation and sick pay unless he is terminating his employment permanently.

Mr. Hanneken applied for unemployment benefits. According to his Petition for Certiorari, he filed claims for permanent partial disability under the Illinois Workers' Compsensation law on September 19, 1984 and October 18, 1984.

Dixon hired a union replacement to fill Mr. Hanneken's job. Thereafter, Mr. Hanneken obtained an unrestricted work release from another doctor, denominated in the Petition for Certiorari as the "treating physician," but he was informed that his old job had been filled.

B. Proceedings Below

After settling his workers' compensation claims, Petitioner on October 2, 1985, filed the present Complaint for "retaliatory discharge" in the Circuit Court for the Third Judicial Circuit, Madison County, Illinois, seeking, inter alia, job reinstatement, compensatory and punitive damages. Mr. Hanneken did not at

any time file a grievance or request an investigation of his job termination, or otherwise seek the remedies available under the collective bargaining agreement, so as to arbitrate his "discharge." We have carefully searched the Complaint and find no allegation of employer "threats," such as are asserted in the Petition for Certiorari and conclude they are unsubstantiated assertions de hors the record. The Complaint did not refer to the existence of the collective bargaining agreement or its coverage of "discharge" disputes.

Dixon requested the Admission of Facts and Genuineness of Documents to establish the existence of the preemptive federal question. Meanwhile, on Motion of Petitioner, the State Court Judge dismissed Dixon's Affirmative Defenses, which alleged a failure to follow the grievance procedures of the collective bargaining agreement and a bar of the action by reason of the settlement of the workers' compensation claims. Upon expiration of the time allowed to respond to the Request for Admission of Facts and Genuineness of Documents, which establish the collective bargaining agreement and the federal preemptive question, this case was removed to the United States District Court for the Southern District of Illinois. No issue of timeliness of removal is raised in the Petitioner's Motion to Remand.

The Motion to Remand was denied and the Respondent's Motion to Dismiss the Complaint was granted. The Petitioner appealed to the United States Court of Appeals for the Seventh Circuit. The appeal was denied on June 29, 1987. Petitioner now seeks review in this Court by Petition for Writ of Certiorari. That Petition correctly reflects the various dates stated therein, so far as Respondent is presently aware.

The District court, when dismissing the Complaint, held:

> ". . . This is precisely the kind of claim Congress intended that the uniform federal labor law govern."

The District Court relied on this Court's holding in *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985) and found the need for uniform federal law in discharge cases covered by a collective bargaining agreement under Section 301 of the Labor Management Relations Act. It further held that regardless of how a state court might label its retaliatory discharge remedy as "contract" or as a "tort" in which the duty arises because of the collective bargaining agreement "just cause" clause, or a duty created by a state statute relating to "unjust discharge" for filing a workers' compensation job injury claim, it was still a dispute covered by the discharge provisions of the collective bargaining agreement, which requires interpretation, application and compliance with that agreement. The "justness" of the discharge is, thus, a matter of preemptive federal law. The person aggrieved must comply with the dispute resolution procedures of the agreement, bebore he can file suit in court.

The District Court relied on *Avco Corp. v. Aero Lodge No. 735, International Association of Machinists & Aerospace Workers, et al.,* 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968) and *Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California, et al.,* 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983) for the proposition that the preemptive force of Section 301 of the Labor Management Relations Act is so great as to make removal to a federal court proper, even though Section 301 is not referred to on the face of the Complaint. The District Court held the claim was "in reality one for violation of the collective bargaining agreement."

Petitioner did not raise in the United States District Court or in the United States Circuit Court of Appeals for the Seventh Circuit, the contention first raised in his Petitioner to this Court, namely, that 28 U.S.C. Sec. 1145(c) bars removal because Petitioner is bringing a claim "arising" under the workers' compensation laws of the State of Illinois. Hence, the District Court

and the Court of Appeals did not have the current contention before them for decision. Petitioner's contention in this regard is, however, disposed of adequately and adversely to him in the Seventh Circuit's holding in *Lingle v. Norge Division of Magic Chef, Inc.*, 823 F.2d 1031 (7th Cir. 1987) at pages 1038 and 1039.

On June 29, 1987, the Circuit Court of Appeals for the Seventh Circuit, after taking Briefs and Oral Arguments, affirmed dismissal of the Complaint on the basis of its en banc decision of June 23, 1987 in *Lingle v. Norge Division of Magic Chef, Inc.*, (85-2971). The Court held the claims under Illinois tort law for retaliatory discharge, where the employee and employer are covered by a collective bargaining agreement having "just cause," grievance and arbitration procedures, are preempted by Section 301 of the Labor Management Relations Act.

The court in *Lingle* analyzed Illinois law creating the tort of retaliatory discharge, as a means of enforcing a provision of the workers' compensation law, which annunciated the public policy of the state. [See: *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353, 23 Ill. Dec. 559 (1978); *Midgett v. Sackett-Chicago, Inc.*, 104 Ill. 2d 143, 473 N.E.2d 1280, 85 Ill. Dec. 475, (1984) cert denied 474 U.S. 909, 106 S.Ct. 278, 88 L.Ed.2d 243 (1985); *Gonzalez v. Prestress Engineering Corp.*, 115 Ill. 2d 1, 503 N.E.2d 308, 104 Ill. Dec. 751 (1986)]. The Seventh Circuit concluded that regardless of the label affixed to the cause of action by Illinois Courts, it was at heart a claim for "unjust" discharge and was covered by the collective bargaining agreement. The court declined to be governed by the Illinois Supreme Court's contemporaneous holding in *Gonzalez* that the tort claim for retaliatory discharge was not preempted by Section 301 of the Labor Management Act. The *Lingle* court favored the view of Justice Ryan in dissent, when he wrote that the question of federal preemptive jurisdiction was controlled by federal, not state, decisions, so that the state courts had no

authority to determine whether the collective bargaining agreement "just cause" discharge provision includes a "retaliatory discharge" claim.

The *Lingle* court further held the claim of federal preemption was governed by this Court's decision in *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985). *Allis-Chalmers* holds a state tort for breach of a fiduciary duty of good faith and fair dealing by an insurance company providing disability insurance to an employee under a collective bargaining agreement requiring the provision of such insurance, is preempted by Section 301 of the Labor Management Relations Act, because the collective bargaining agreement provides procedures for adjusting disputes regarding the handling of claims; because of the particular force of preemption intended by Congress when enacting Section 301, and because of the policy need to have uniform federal decisional law in this area of employer-employee disputes.

Lingle also held federal preemption jurisdiction could not be defeated by "artful" pleading in simply failing to reference the existence of the collective bargaining agreement on the face of the Complaint. The expressed intent of the Labor Management Relations Act and the construction given to it by the court, requiring a uniform body of federal decisions, overrode state policy decisions in the same area affecting employment or discharge disputes. Neither is the existence of the possibility of punitive damages a reason to defeat federal preemption in this basic area of management-labor relations.

Finally, *Lingle* distinguished the holding of this Court in *Caterpillar, Inc. v. Williams,* ____ U.S. ____, 107 S.Ct. 2425 (1987) where multiple, independent contracts were allegedly created regarding the provision of employment in the event of plant closing or movement, because the independent agreements were made when the plaintiffs were not even members of a collective bargaining unit and no provisions of a collective bargain-

ing agreement were involved. Hence, the pure contract action for declaratory relief was not federally preempted in *Caterpillar,* because Section 301 was not involved. However, where the retaliatory discharge "tort" claim is a mask for what is really a "just cause" termination claim covered by a collective bargaining agreement, the claim is preempted.

REASONS FOR NOT GRANTING THE WRIT

A. The Decision Is Mandated By This Court's Holding In Allis-Chalmers Corp. V. Leuck.

There is no reason to grant review of the decision in this case, because the decision of this Court in *Allis-Chalmers,* supra, clearly mandates the result reached, in that it squarely holds state "tort" remedies involving interpretation of discharge provisions of the collective bargaining agreement are fully preempted by Section 301 of the Labor Management Relations Act. Where the collective bargaining agreement provides grievance procedures for disputes arising from matters covered by the agreement, those procedures must be utilized to the exclusion of independent remedies. Industrial peace, the good of the whole, the policy of Congress and the employer's reasonable economic expectations at the time he enters the collective bargaining agreement, operate to preclude independent actions for punitive damages outside the framework of the collective bargaining agreement. Substantive principles of federal law must be paramount in suits of a kind covered by Section 301, so as to have a uniform labor policy. Almost any suit for breach of contract in employment can be fashioned into a "tort" claim for wrongful discharge, breach of fiduciary duty or the like. Denomination of such claims as "tort," rather than "contract" actions, seldom changes the basic character of such claims as disputes arising under some provision of the employment agreement. Whether the claim is for the "tort" of breach of good faith in processing insurance disability claims is preempted by the collective bargaining agreement covering the provision of such insurance and providing a grievance procedure, or whether a "tort" for wrongful or retaliatory discharge, also covered by the collective bargaining agreement "just cause" termination, grievance, arbitration and provision of workers' compensation insurance clauses, the result should be the same because the principles applied are the same. The need for uniformity and predictability require federal interpretation.

The congressional policy to foster employer work agreements with the workers' collective bargaining unit and to resolve disputes by arbitration, and not by resort to individual "tort" actions, is nowhere more apparent than here. Individual actions which ignore the collective bargaining agreement and the union, undermine the congressional purpose to foster and preserve the rights of both management and labor through collective bargaining action really demean the union's representative capactity.

The retaliatory discharge torts are common law actions fashioned as a matter of policy by the state courts to enforce state policies that discharges not be "unjust." They are perceived to be "unjust," where they are made in retaliation for conduct protected by the state, such as filing a claim for a job related injury. State common law policy considerations in fashioning such torts, however, must give way to the higher congressional policy to require federal jurisdiction where the dispute is, at heart, one covered by a collective bargaining agreement, which, in turn, is one of the centerpieces of federal labor law.

The states, under *Allis-Chalmers,* supra, still have some regulatory authority of labor management relations, but where state rules would allow circumvention of dispute mechanisms collectively bargained, and where the disputes are at the very heart of such agreements, such as, hiring, discharge, suspension, wages, hours of work, working conditions and the like, the powerful preemptive force of Section 301 is superior to state rules and must override them. Accord: *Franchise Tax Board of California, v. Construction Laborers Vacation Trust for Southern California, et al.,* 463 U.S. 1, 23, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983), where the court stated in discussing its holding in *Avco Corp. v. Aero Lodge No. 735, International Association of Machinists & Aerospace Workers, et al.,* 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968):

> ". . . 'The preemptive force of Section 301 is so powerful as to displace entirely any state cause of action for violation of contracts between an employer and labor organization. Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of Section 301."

The instant case so clearly falls under these precepts; the "vindication" of Petitioner's "discharge" so necessarily turns on a consideration of the "justness" of such discharge under the collective bargaining agreement, that no further review is necessary here. Petitioner merely wants a second appeal. He is not entitled to a second appeal, because the law is clear that he cannot ignore the collective bargaining grievance machinery, as he did, in order to file a tort claim for punitive damages in the state court.

B. Petitioner Has Waived Any Claim To Assert 28 U.S.C. Section 1445(c) As The Basis For Depriving The District Court Of Federal Removal Jurisdiction.

Petitioner's 28 U.S.C. Section 1445(c) claim is insufficient to warrant independent review of the decision of the Circuit Court of Appeals by this Court. Petitioner acknowledges in his Petition that this Section is not alone a sufficient basis to cause this Court to review the Circuit Court of Appeal's decision . Respondent suggests Section 1445(c) is not even properly before this Court, since it was never raised by Petitioner as a bar to federal jurisdiction in either the District Court or the Court of Appeals. Hence, it must be deemed waived, unless some principle of relief on matters de novo is to be inaugurated for this Court.

Even more, Section 1445(c), which denies removal of cases arising under the workers' compensation laws of a state does not apply, as noted by the court in *Lingle,* supra. First, the preemptive force of Section 301 of the Labor Management Relations Act confers original federal court jurisdiction where a

collective bargaining agreement exists pursuant to the provisions of that act. Hence, the suit does not arise under the workers' compensation laws of Illinois. Moreover, in the case at bar, to the extent that workers' compensation is involved in Petitioner's claim, he has received, and admits he has received, his full benefits thereunder for both temporary total and permanent partial disability. The admitted facts show he is, because of permanent partial disability, unable to do his former job, which includes lifting barrels weighing more than fifty pounds. The admitted facts are that the man wanted a "light" job and none existed. He "cashed out" his benefits and, when he had them paid, he retaliated with this suit for punitive damages and ignored his collective bargaining agent, the union, and the provisions of the collective bargaining agreement. As noted by *Lingle,* the Illinois courts hold the retaliatory discharge action as a common law action that does not arise under the Workers' Compensation Act. Hence, Section 1445(c) is inapplicable.

Finally, the court in *Lingle* correctly perceived that the interpretation of whether the claim "arises" under the workers' compensation laws of the state is a matter for federal interpretation, not state court interpretation. Under the federal interpretations applicable, Section 1445(c) is not involved.

C. Federal Preemption Under Section 301 Is Not A Matter For State Court Determination.

Petitioner suggests the federal court does not have jurisdiction of the issues in this case, because the preemption question could be raised as a matter of affirmative defense to the state court action and removal cannot be had where the federal question is raised as a matter of defense. In the first place, such argument ignores the decisions of this Court in *Avco Corp.*, supra, and *Franchise Tax Board of California*, supra, that Section 301 preemption is of such powerful force that in a case where it applies, the well pleaded complaint concept, which complaint omits reference to applicable federal jurisdiction,

does not exist. State laws, regulations and tort remedies that conflict or attempt to replace or supplant the federal laws simply do not apply and federal jurisdiction controls regardless of how the original complaint may be framed. *Avco Corp. v. Aero Lodge No. 735, International Association of Machinists & Aerospace Workers, et al.*, 390 U.S. 557, 560, 88 S. Ct. 1235, 20 L.Ed.2d 126 (1968); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904, 1909, 85 L.Ed.2d 206 (1985); *Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California, et al.*, 463 U.S. 1, 23, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983); *Caterpillar, Inc. v. Williams*, ____ U.S. ____, 107 S.Ct. 2425, 2429 (1987). With reference to *Caterpillar,* it is expressly noted that the federal preemptive jurisdiction for Section 301, as annunciated in *Avco Corp.*, supra, is reaffirmed. Thus, *Caterpillar* expressly preserves the federal preemptive jurisdiction of Section 301 where a collective bargaining agreement is involved. It is authority in favor of Respondent's position, not, as Petitioner would have it, authority adverse to the holdings in *Lingle. Caterpillar* and *Lingle* are one on the concept of preemptive jurisdiction.

Even if the "well pleaded complaint" rule were applicable, which it is not, in this case, there exists the well recognized exception to that rule, which is the "artful pleading" rule, namely, a party cannot, by disguising a claim arising under a federal right in the clothes of a state claim, whether it is tort or otherwise, defeat federal jurisdiction. *Avco Corp. v. Aero Lodge No. 735, International Association of Machinists & Aerospace Workers, et al.*, 390 U.S. 557, 560, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968); *Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California,* 463 U.S. 1, 24, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983); *Allis-Chalmers Corp. v Lueck,* 471 U.S. 202, 105 S.Ct. 1904, 1911, 85 L.Ed.2d 206 (1985); *Leu v. Norfolk & Western Railroad Co.*, 820 F. 2d 825, 830 (7th Cir. 1987); *Lingle v. Norge Division of Magic Chef, Inc.*, 823 F.2d 1031, 1040 (7th Cir. 1987). When the existence of the collective bargaining agreement is established, the

claimant can no longer avoid the preemptive federal question. Hence, whether the federal preemption exists because of the peculiar force of Section 301 preemption, which is of such powerful force that federal jurisdiction attaches without the collective bargaining agreement being pleaded in the Complaint, or whether the artful pleading rule calls into existence federal preemption upon the admission of the existence of the collective bargaining agreement covering the sort of dispute which is the subject of state court claim, the state jurisdiction gives way in favor of federal jurisdiction.

D. Any Conflicts Among The Circuits On The Same Subject Matter Do Not Warrant A Grant Of Certiorari Here

Although a conflict exists among the Circuit Courts of Appeal as to whether Section 301 of the Labor Management Relations Act preempts state tort remedies labeled "retaliatory discharge" actions, such conflict does not provide sufficient basis for a second appeal in this case, because the factual context here overwhelmingly shows the Petitioner received full workers' compensation benefits; returned to work after the first injury; received two permanent partial disability awards, which he contended rendered him unable to perform his job duties, thus terminating his employment; was replaced by another union worker, and was seeking to have his employer create a non-existent "light duty" job. Certainly no Illinois workers' compensation statute requires an employer to create a non-existent job or to retain in his employment a person whose job related injury renders him permanently and partially disabled from doing his job. Hence, as a matter of law, there is not only no violation of 48 Ill. Rev. Stat. 1975, Sec. 138.4(h) and, therefore, no violation of any state public policy to allow an injured employee to pursue his full workers' compensation remedies, but, also, the circumstances make dramatically clear that any dispute or dissatisfaction Mr. Hanneken perceived, was one easily resolved by resort to the grievance and arbitration

mechanism of the collective bargaining agreement. In short, the case at bar, as a matter of law, does not present any conflict between state statutory policy and Section 301 of the Labor Management Relations Act, but presents solely a question under Section 301 involving only federal policy. There is no important reason warranting review here, even though the Circuits may differ on the preemptive effect of Section 301 when it collides with state policy in another contextual setting.

Specifically, the Circuit Courts of Appeal's decisions holding federal law preempts disputes arising out of employment contract termination, even though there may be a conflict with state policy, are: *Lingle v. Norge Division of Magic Chef*, 823 F.2d 1031 (7th Cir. 1987), en banc, and *Johnson v. Hussmann Corp.*, 805 F.2d 795 (8th Cir. 1986). In neither of these cases did the employees involved, according to the reports, receive any benefits or determinations involving physical inability to do their work. Similarly, the cases in conflict with *Lingle* and *Johnson*, i.e., *Baldracchi v. Pratt & Whitney Aircraft Division United Technologies Corporation*, 814 F.2d 102 (2nd Cir. 1987); *Herring v. Prince Macaroni of New Jersey, Inc.*, 799 F.2d 120 (3d Cir. 1968) and *Peabody Galion v. A.V. Dollar*, 666 F.2d 1309 (10th Cir. 1981) involve situations where the worker did not receive any benefits and there was no claim of permanent partial disability, when the terminations occured.

Indeed, *Herring* did not even discuss preemption of Section 301, but related only to New Jersey state law. Consequently, it is not in conflict with *Lingle* or *Johnson*, as to the effect of Section 301. *Peabody* was decided before this Court's opinion in *Allis-Chalmers*, supra, and to the extent it is in conflict with *Allis-Chalmers* must be deemed overruled. *Baldracchi* is in conflict with *Lingle* and *Johnson*; limits *Allis-Chalmers* to its factual context; but, as previously noted, involves a situation in which no benefits were provided or permanent disability present under the Connecticut Workers' Compensation Act there involved.

Even if there were no violation of the state public policy as a matter of law, but an evidentiary hearing were required, it is apparent here the state remedy is inextricably intertwined with the "just cause" discharge and dispute resolution mechanism of the collective bargaining agreement. The question involved would be the "justness" of the employee's job separation. Under the collective bargaining agreement the arbitration panel would have to decide whether the employee was separated because of his claimed physical inability to meet the job requirement to lift more than fifty pounds. Even if a state court jury trial were authorized for claimed "retaliatory discharge," a factfinder would have the same basic factual issues presented. The correctness of the Seventh Circuit's decision in the case at bar is so apparent and forceful, that there should be an end declared to litigation and the requested Writ of Certiorari positively denied.

In summary, the conflicting Circuit Courts of Appeal's decisions do not provide the basis for a review here, because on the face of the Complaint and admitted facts, there is no violation of the public policy of the State of Illinois, as expressed in the workers' compensation statute or as extended by state common law construction to create tort remedies. There being no violation of Illinois public policy as a matter of law, the only law that could apply to resolve any dispute is under the collective bargaining agreement, which the employee/petitioner has chosen to ignore. The conflicts of the Circuits over the preemptive effect of Section 301 when there is a collision with state policies do not apply here, where there is no conflict. The remedy of the collective bargaining agreement would require the same factual resolution as a state remedy, even if enforcement of the state public policy were involved. There is no compelling reason to review this case where the dispute is so clearly involved with the collective bargaining agreement's provisions. There are insufficient reasons for a second appeal through a grant of certiorari in this case.

BEST AV

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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